Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 92-316
	)	
RIVERTOWN COMMUNICATIONS COMPANY INC.	)	File No. BPH-911008ME
	)	
SAMPLE BROADCASTING COMPANY, L.P.	)	File No. BPH-911010ME
	)	
For Construction Permits For a New FM Station on Channel 282C3 at Eldon, Iowa	)	

TO: The Review Board

EXCEPTIONS AND BRIEF OF RIVERTOWN COMMUNICATIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Rivertown Communications Company, Inc, by its attorney, pursuant to Section 1.276 and 1.277 of the Commission's Rules, hereby submits its Exceptions and Brief directed to the Initial Decision of ALJ John M. Frysiak released herein on November 10, 1993.

I. Statement of the Case, and Summary of Argument

This proceeding involves two applicants for a new Class C3 FM station to be licensed to the community of Eldon, Iowa (1990 Population 1070), located in Wapello County. The channel was allocated on the petition of Rivertown's David Brown; Rivertown's application was challenged by Sample Broadcasting Company, L.P. ("Sample"), whose general partner, Carmela Sample (now Sample-Day), was until August 1993 the News Director of Station KKSI-FM, licensed to nearby Eddyville, Iowa, and whose limited partner, Bruce

Linder, is a 25% owner of Station KKSI and the son of the majority owner thereof.

In addition to the standard comparative issue, issues were added to determine whether KKSI and its owners are the real parties-in-interest to the Sample application, and whether the application was filed for the purpose of delaying action upon the Rivertown application. These issues were added on the basis of a number of statements made to David Brown in 1991 and 1992 by Mark McVey, KKSI's 20% stockholder, officer, director, and chief engineer, concerning the Sample application.

In resolving the added issues favorably to Sample, and comparatively preferring the Sample application over that of Rivertown, the Judge materially erred in the following respects:

1) He failed to resolve adversely to Sample specified issues regarding the sponsorship of Sample by O-Town Communications, Inc., licensee of Station KKSI(FM), Eddyville, Iowa;

2) He uncritically accepted Sample's "limited partnership" at face value, and thus accorded Sample greater quantitative integration credit than Ms. Sample-Day's 40% equity interest merited, and failed to assign to Sample demerits for the other media interests (including a 25% interest in nearby KKSI) of its 60% equity "limited" partner, Bruce Linder;

3) He refused to accord Rivertown any qualitative enhancement for Mr. Brown's civic activities, based upon the patently erroneous conclusion (¶103) that "Brown does not, except for stating membership, identify what activities were performed;"

4) He accorded Sample comparative credit for proposing auxiliary power, despite the fact that Sample proposes only to install a single generator although its studios and transmitter will not be collocated;

5) He accorded Sample 100% credit for minority status, notwithstanding that (a) there is virtually no Hispanic population in Eldon or the surrounding area, and (b) Sample has proposed no programming oriented to Hispanic or other minority needs;

6) He failed to engage in any reasoned analysis of the comparative strengths and weaknesses of the applicants (as he found them), merely concluding, ipsi dixit (¶113): "Sample's credits outweigh Rivertown's. Sample is the winner."

In addition, the Judge's refusal to enlarge issues to inquire into possible misrepresentation by Sample in its September 1993 amendment regarding the termination of Ms. Sample-Day's employment by Station KKSI (Memorandum Opinion and Order, FCC 93M-887, released November 1, 1993) was error.

II. Questions of Law Presented

1) Whether the record as a whole requires the conclusion that the Sample application was sponsored by and for the benefit of KKSI and/or its owners;

2) Whether the record as a whole requires the conclusion that the Sample limited partnership is not bona fide, thereby entitling Sample to no more than 40% integration credit, and earning it a substantial diversification demerit flowing from Bruce Linder's multiple broadcast interests, including that in overlapping KKSI-FM, Eddyville, Iowa;

3) Whether Commission precedent requires reversal of the Judge's denial of any credit for David Brown's civic participation;

4) Whether any credit for auxiliary power may be awarded where only one generator is proposed for a facility whose studios will not be collocated with its transmitter;

5) Whether a "minority enhancement" may be awarded to a 50% Hispanic where the area to be served contains less than 1% Hispanics, and the applicant proposes no service directed to Hispanics.

6) Whether improperly awarded "minority" and auxiliary power preferences may overcome "substantial" preferences awarded the competing applicant for local residence and broadcast experience.

7) Whether facially contradictory statements in Sample's September 1993 Amendment, coupled with evidence that raised substantial questions as to the accuracy of representations in that amendment, warranted enlargement of the issues.

III. Argument

A. KKSI is The Real Party-in-Interest To Sample's Application

Paragraphs 29 - 64 of the Initial Decision, which deal with the origins of Sample's application and various characterizations thereof made by KKSI vice-president, director and stockholder Mark McVey in conversations with Riverside's David Brown, are erroneous in several respects, and incomplete in a number of critical aspects.

As an initial matter, it must be pointed out that the recital, at ¶¶66-67, of the ownership history of O-Town Communications, Inc. (KKSI) omits the most significant fact; i.e., that, as McVey admitted during his cross-examination (Tr. 221-225), his agreement with John and Donald Linder for their financial support of his settlement agreement with a competing applicant and for construction of the Eddyville station, in return for their ultimately receiving a controlling equity interest in the station, was not reported to the Commission, either as an amendment to O-Town's then-pending application, or in the initial ownership report

filed by O-Town in the summer of 1990.[1]

Thus, there is established at the outset that O-Town Communications and its principals[2] have a demonstrated propensity to deceive the Commission through the withholding

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[1] The Judge's failure to find that McVey and the Linders concealed their agreement from the Commission may be attributable to his unspoken acceptance of the arguments of Sample at page 17 of its Reply Findings, where it stated:

> "The only evidence on this matter is McVey's testimony on cross-examination of events which occurred a number of years ago. It has been established that his memory is not precise. The record is simply not clear that McVey had reached a definitive agreement with Donald and John Linder for their acquisition of control of O-Town prior to Commission grant of the Eddyville application. Absent such agreement, there would have been nothing to report to the Commission."

McVey's testimony on this point was perfectly clear; the events occurred just three and one-half years prior to his testimony here. Sample chose not to question him on this subject on redirect, and offered no other evidence on the subject through rebuttal (e.g., testimony by John or Donald Linder).

It should be noted that counsel for Sample are also counsel for KKSI; indeed, at the deposition of Mr. McVey, both Messrs. Miller and Neely appeared on behalf of O-Town -- not Sample (or McVey personally) -- Mr. Miller explaining: "To the extent that there is a commonality of interest, and we believe that there is, we believe that Sample's interests are being represented here; however, our representation today is on behalf of O-Town." (See Attachment A hereto).

It should also be noted that Rivertown's February 24, 1993 Motion to Enlarge Issues as to the KKSI involvement in the Sample application specifically requested that O-Town be made a party, a request not mentioned by the Judge in his March 26, 1993 order (FCC 93M-124) enlarging the issues.

[2] Bruce Linder was not a stockholder of O-Town Communications initially, but acquired his brother John's 20% (as well as 5% from his father) in the Spring or Summer of 1991. However, he had been involved in the management of KKSI prior to becoming a stockholder (Tr. 295).

of facts concerning the ownership and control of a proposed Commission licensee. The KKSI ownership history also demonstrates that McVey's statements to Brown that the Linders would control Ms. Sample-Day were well-based upon his own experience.

The Judge's treatment of these issues rests in the main on his uncritical acceptance of the testimony of McVey, Bruce Linder, and Ms. Sample-Day, despite their self-serving nature and many internal inconsistencies. For example, in ¶32,[3] the Judge finds that "McVey had not spoken to anyone connected with Station KKSI about this subject [a program tie-in between KKSI and the Eldon station] prior to his conversation with Brown in [June] 1991;" yet in the very next sentence, he acknowledges Bill Collins' testimony that in April 1991 (i.e., two months prior to the McVey-Brown conversation), upon learning of the proposed allotment to Eldon, McVey had stated publicly, while in KKSI's studios at Oskaloosa, "We ought to get Carmela (Sample) to file on that (Eldon) frequency, and then what we ought to do is tie them together so you would have KKSI-FM from here to the Mississippi River." Nowhere does the Judge acknowledge McVey's concession (Tr. 233) that Collins' testimony was generally correct on this point, and that although McVey

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[3] The opening statement of this paragraph -- "McVey disallows that it is possible" that the Eldon station was mentioned in this June 1991 conversation with Brown (emphasis added) -- is obviously wrong, as is evident from the balance of the paragraph.

initially testified that he couldn't recall mentioning Carmela Sample (Id.), he later testified that he believed that she was present when he made those remarks, and conceded that her presence might have prompted him to say that "we ought to get Carmela to file for it." (Tr. 250).

McVey has not denied that he stated to Brown that the Linders had asked him to select the site for the Eldon station to avoid city-grade overlap with KKSI; he has not denied stating that Ms. Sample-Day was chosen as the principal because of her minority status, and that she would be controlled by the Linders. To the contrary, through a "confession-by-avoidance," he has attributed such remarks to (a) an assumption on his part that Linder would be an active principal in the application, and (b) "mean-spiritedness" on his own part borne of occasional frustrations with the Linders' management, and has denied that he was speaking as an officer, director, and stockholder of KKSI.

The Judge's acceptance of McVey's exculpatory statements might have been sustainable were not the total circumstances surrounding the organization of Sample and the preparation of its application so corroborative of McVey's statements to David Brown. In sum, the record taken as a whole warrants conclusions adverse to Sample on the enlarged issues.

B. Sample Is The Classic "Sham" Applicant

The Supreme Court has recognized that "The FCC's Review Board in supervising the comparative hearing process seeks to detect sham integration credits claimed by all applicants, including minorities," and it has charged the Commission to "identify and eliminate those applicants who are not bona fide;" Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3025 n. 48 (1990). The U.S. Court of Appeals for the District of Columbia Circuit has also noted that the Commission's comparative criteria have spawned a number of "'strange and unnatural' business arrangements" Bechtel v. F.C.C., 957 F.2d 873, at 880 (D.C.Cir. 1992). As the Review Board recently stated:

> "At the FCC and in most of the 'sham' cases cited by the courts, we experience these curious business role reversals in which those with experience and finances enlist an inexperienced and impecunious individual as their putative 'controlling' principal. The intent of these upside-down constructs is manifest."

Gloria Bell Byrd, 7 FCC Rcd 7976, at 7980 n. 34 (R.Bd. 1992).

Sample presents just such a case. While Ms. Sample-Day is not totally lacking in broadcast experience, and while she and Mr. Linder were not complete strangers prior to the formation of the applicant, her experience scarcely qualifies her for assuming the managerial controls of a start-up operation (witness her total reliance upon KKSI's McVey for selecting her equipment package). Indeed, she was

not even considered for the general manager position at KKSI which opened just a month prior to the initial discussion between her and Bruce Linder concerning the Eldon application (Tr. 138, 298).

For his part, Mr. Linder's seeming indifference to her lack of business experience and financial capabilities, despite having known her for barely eight months (during which he estimates that he actually saw her on about a dozen occasions) (Tr. 133, 300), further confirms that the Sample partnership is not a bona fide business relationship, and that his asserted intent to remain detached while she plays "general manager" with his $300,000 (having made no investment of her own) cannot be viewed seriously. See Annette B. Godwin, 8 FCC Rcd 4098 (Rev.Bd. 1993), and cases cited therein.

While Bruce Linder has been careful to keep his fingerprints from appearing on the Sample application, he has had the continuing ability to control Ms. Sample-Day in several ways:

(1) By virtue of her employment at KKSI (until her discharge in August 1993; see Part [G], infra).

(2) Sample's representation by Bruce Linder's own attorneys, manifesting their judgment that there is no conflict of interest between KKSI and the Linders, on the one hand, and Sample Broadcasting and Ms. Sample-

Day, on the other.[4]

(3) Ms. Sample-Day's reliance upon McVey (with whom Bruce Linder is in regular contact) for detailed guidance in the preparation of the Sample application.

Ms. Sample-Day was chosen by Mr. Linder without regard for her lack of business or sales experience, or for her lack of money. He had known her for less than nine months, and seen her only a dozen times at most, when the application was conceived. He did not ask for her resume, or her balance sheet, nor did she ask for his (Tr. 299, 301, 319). It was Bruce Linder who chose the limited partnership vehicle (Tr. 311); she didn't know the difference between a partnership and a corporation (Tr. 131); her concern that she would be personally responsible for all station losses beyond his $6,000 capital investment was dismissed by him as one of several "quip[s] . . . about things she didn't completely understand." (Tr. 323). Sample implies that it was merely coincidence that she chose counsel and engineering consultants already utilized by KKSI. While Linder appears to have maintained a respectful distance from the details of the application, he was aware that she was being guided by McVey and by his own lawyers throughout.

Ms. Sample-Day has made no financial contribution for her 40% equity. Bruce Linder is the sole source for

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[4] See footnote 1, p. 6, supra.

Sample's funding, both to cover the costs of prosecuting its application, and for the construction and operation of its station, and will receive a lien on the station's assets to secure his $300,000 construction loan to Sample. Although he will assign that lien to his bank (the source for his $300,000 loan to Sample), he will continue to be the principal creditor of the partnership; while the partnership agreement specifically provides that the terms of his initial loan (to fund the prosecution of the application) bar him from exercising any right to control or influence the activities of the partnership, no such limitation is contained in his letter agreement of October 9, 1991, to lend $300,000 for the construction and operation of the station.

As the Judge found at ¶60, the terms of the $300,000 loan from the bank to Linder, and from Linder to Sample, call for the payment of interest only for the first six months,[5] with the principal to be amortized with monthly payments of principal and interest over the next sixty months.[6]

Under their partnership agreement (Sample Ex. 1,

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[5] Interest is to be at 2% over the variable rate; Tr. 333.

[6] Based on today's prime rate of 6%, and adding the two points specified in the bank's letter to Linder, the six monthly payments of interest only would be $2,000 each, and the monthly payments of principal and interest for the next sixty months would be $6,083.

Attachment), all partnership losses beyond $6,000 will be allocated to Ms. Sample-Day, and the limited partnership will terminate in the event of her insolvency.[7] It is, of course, hornbook law that a general partner is responsible for the debts of the partnership. Should Sample Broadcasting default in repaying its loan from Bruce Linder, Ms. Sample-Day is responsible for that debt, and if she is unable to pay it, by definition she is "insolvent."[8]

In implicitly concluding that the Sample application was bona fide, the Judge gave no apparent consideration to the financial realities of the Linder-Sample relationship, or to the fact that his position as the secured creditor of Sample renders the protective provisions of the partnership agreement, and his protestations of abstinence from involvement in Sample's affairs, mere cant.

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[7] Prior to the application, Linder knew that Ms. Sample-Day didn't have much money (Tr. 319). While an impecunious general partner is to be avoided in a true business partnership, that very impecuniousness becomes an asset to a limited partner (particularly one who is also the principal creditor) intent on assuming control of the venture at the earliest possible moment.

[8] Moreover, the partnership agreement accords Bruce Linder a right of first refusal to acquire Ms. Sample-Day's interest, should she die, become incapacitated, or "desire . . . to dispose of" her interest; and to acquire the assets should she desire to dispose of them; see Sample Ex. 1, Attachment, p. 9. Bruce Linder acknowledged that "if there was a problem paying the bills of this station, Carmela would try to sell it or something like that." (Tr. 335).

As the Commission observed in Royce International Broadcasting, 5 FCC Rcd 7063, at 7064, (1990) (emphasis added), describing the more egregious cases where no integration credit should be awarded:

> "The ownership and control of the applicant may be shown to be fatally uncertain because . . . a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs. 10/
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> 10/ For example, the applicant may have been formed in a manner that is irreconcilable with the exercise of sound business judgment. That is, it may appear that the individuals organizing the applicant are giving away control or ownership in a manner that is patently unreasonable if taken at face value. See Metroplex Communications, Inc., 5 FCC Rcd 5610 (1990). Cf. KIST Corp., 102 FCC 2d 288, 292 para. 8, 292-93 n. 11 (1985) (where it appeared unbelievable, under the circumstances, that an investor would give away control of the broadcast applicant to an individual who would make no investment)."

Clearly, Sample is precisely such an applicant.

In sum, the Sample two-tiered structure must be regarded as not bona fide, but as a sham designed to maximize whatever credit might be accorded Ms. Sample-Day's fractional minority status, and to foreclose comparative consideration of Mr. Linder's multiple broadcast interests, and his distant residence -- the objectives conceded by Linder in his testimony (Tr. 309). So viewed, it is clear that Sample cannot prevail over Rivertown, earning at most a 40% integration credit (none under the Royce principle), and weighted down with the Bruce Linder's many media interests, including the overlapping service of Station KKSI.

C. Denial of Credit to Rivertown For Brown's Civic Activities Is Contrary to Commission Precedent

¶10 of the Initial Decision, quoting from Rivertown's Exhibit 2,[9] set forth David Brown's civic activities.[10] However, at ¶103, the Judge concludes that these do not entitle Rivertown to "civic activities enhancement," because

> "Brown does not, except for stating membership, identify what activities were performed. His promotion of fund raising for new uniforms for Ottumwa High School in 1982 is too remote to receive any credit."

These conclusions are both factually and legally incorrect. The first and third items did not merely describe membership in those organizations, but stated that he was a member of their respective Boards. The second item -- Brown's receipt of United Way's Silver Award for "outstanding service" -- demonstrates significant activity on Brown's part: Such organizations do not bestow "outstanding service" awards for mere "membership." And when "chairperson" is corrected to "chaperon" of the Great Western Expedition, the "activity" involved is self-evident.

As to Brown's purported failure to describe the amount

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[9] In reference to the Great Western Expedition, the ID converted "chaperon" to "chairperson".

[10] Sample's cross examination of Brown did not touch on the subject of his civic activities; its strategy was revealed in its Proposed Findings, where it claimed that these should be totally disregarded as they had not been enumerated in Rivertown's application: See Sample Proposed Findings, ¶¶151. The frivolousness of the Sample argument was shown in Rivertown's Reply Findings, ¶5, and the Judge did not dignify it with discussion.

of time devoted to each activity, both the Board and the Commission have recently overruled a similar holding by ALJ Gonzalez on this very point. As the Commission stated:

> "[Applicant's] submission, for the express purpose of demonstrating entitlement to credit for local civic participation, of a sworn statement that he had belonged to those named organizations and had held certain positions of responsibility in them is a prima facie showing of involvement in civic activity . . ."

Edward F. and Pamela J. Levine, 8 FCC Rcd ___, Memorandum Opinion and Order (FCC 93-509) released November 30, 1993, at ¶10, reversing Review Board Decision (but affirming on this point), 8 FCC Rcd 2630 (1993).

Finally, the Judge's rejection of Brown's fund-raising activities for the Ottumwa High School Band in 1982 as "too remote," is irrational, both standing alone, and in conjunction with Brown's contemporaneous (1982 and 1983) membership on the boards of the Wapello County Cancer Society and Care and Share, and his 1982 receipt of United Way's Silver Award for "outstanding service to the people of our community" -- none of which was deemed by the Judge as "too remote."

While the Judge cited no authority for his dismissal of Brown's 1982 fund-raising activity as "too remote," guidance on this subject may be gleaned from the Board's decision in Northern Sun Corp., 100 FCC 2d 889, at 893 (1985), recon. den. FCC 85R-42, rel. May 9, 1985, review denied FCC 86-135, rel. March 28, 1986. There, the Board contrasted the

rejection as "antediluvian" civic activities discontinued 25 years earlier (citing Ottumwa Broadcasting Co., 92 FCC 2d 1011 [Rev. Bd. 1982]), with a "discount" of civic participation which ceased more than seven years prior to the filing of the application (citing Veteran's Broadcasting Co., Inc., 38 FCC 25, 61 [1965]), and Radio Jonesboro, Inc., 55 RR 2d 991 at 994 (Rev. Bd. 1984).[11] Here, of course, Brown's activities in the proposed service area did not cease in 1982-1983; while residing in Fairfield in 1988-89,

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[11] With due respect to the Jonesboro Board, it is submitted that it misread Veterans to warrant discounting any civic activities occurring more than seven years prior to the application, regardless of whether the individual had engaged in civic activities in the intervening seven-year period. In fact, in Veterans (which predates the 1965 Comparative Hearing Policy Statement) the Commission noted with some disparagement that an applicant's 80% principal had retired from all activity (including civic activities) seven years earlier, upon the sale of his radio station, and spent substantial periods of time vacationing in Florida, viewing with extreme skepticism his full-time integration proposal.

Veterans (with which Northern Sun is in accord) clearly does not stand for the proposition that any civic participation predating the application by more than seven years will be discounted. Indeed, since civic participation is an enhancement of local residence, and since longer local residence is preferred to shorter, the Jonesboro variation on the Veterans theme is illogical and inconsistent.

The Commission has, sub silentio, rejected the Jonesboro variation in Colonial Communications, Inc., 6 FCC Rcd 2296 (1991), and fully credited an applicant's civic participation despite the fact that some of those had ceased eight years before her application, and the balance had ceased four years prior to the application, citing Northern Sun for the proposition that "7-year hiatus between civic activities and application did not substantially diminish credit for civic participation." 6 FCC Rcd 2297 (¶11), emphasis added.

he was a member of the Fairfield County Isaac Walton League, and the Fairfield JayCees.

While Brown's civic activities pre-date those claimed by Ms. Sample-Day, they were significantly more substantive than hers. Aside from hosting and judging a pet show, MC'ing a talent show, and participating in an Oktoberbest parade and helping in its food tent,[12] all of Ms. Sample-Day's claimed activities were job-related,[13] and took place when she was a part-time news employee of Station KOIA-TV; see I.D., ¶24. She has belonged to no civic organizations, much less occupied a position of responsibility in such an organization; and has claimed no such activities during the period of her employment at KKSI.[14]

In sum, Rivertown is due a significant enhancement

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[12] That Sample seeks civic participation credit for such banal activities merely demonstrates its own recognition that Ms. Sample-Day has no significant record of civic participation.

[13] While the Judge is correct (¶108) that the Board held in Eve Ackerman, 7 FCC Rcd 2493 (1992), that activities undertaken in connection with one's employment are not negated, the activities involved there were substantial, and of an ongoing nature (see Initial Decision, 6 FCC Rcd 5277, at 5278-9, ¶¶16-18). By contrast, all of Ms. Sample-Day's claimed activities were one-shot affairs. In this respect, Sample's case is more analogous to that in Jarad Broadcasting Co., 1 FCC Rcd 181, at 187 (Rev. Bd. 1986), ¶34, where involvement in "broadcasting activities, including shows dealing with political and civic affairs" were deemed "incidental to . . . work experience" and given little or no weight.

[14] Ms. Sample-Day's lack of familiarity with the community of Eldon was demonstrated by her inability to even approximate its population; Tr. 158-60.

credit, vis-a-vis Sample, for Brown's civic activities.

D. Sample's Auxiliary Power Proposal Is A 50% Solution, Warranting No Credit

In according Sample a comparative preference based on its proposal to install an auxiliary generator at its transmitter, the Judge erred doubly: first, in finding that Sample unequivocally proposed to place its generator at its transmitter site, and second, in failing to acknowledge that, since Sample did not propose to place a second generator at its studios, the objective of the credit -- continuity of service in the event of power outage -- would not be achieved.

In fact, at Tr. 182-83, Ms. Sample-Day expressed uncertainty as to whether the single generator proposed (Rivertown Ex. 10, fifth [unnumbered] page; Rivertown Ex. 12, second [unnumbered] page) would be located at the transmitter site (some 12 miles east of Eldon) or at the studios, and acknowledged that she had not previously recognized that two generators would be required to ensure continued operation in the event of a power failure.

E. Sample Should Be Accorded No "Minority Preference," As It Will Serve No Diversity Interest

In awarding Sample an apparently controlling minority preference, the judge refused to give any consideration to the total lack of any nexus between Ms. Sample-Day's 50%

Hispanic heritage, on the one hand, and the needs and interests of the proposed service area, and the service objectives of Sample, on the other.

In Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997 (1990), the majority of the Supreme Court concluded that minority preferences were not unconstitutional, based upon (a) the legitimate Governmental interest in diversity of programming, and (b) a demonstrated nexus between minority ownership and minority-oriented programming.[15] Here, Sample has made no effort to demonstrate any nexus between Ms. Sample-Day's 50% Hispanic heritage and the promotion of programming diversity in Eldon and the surrounding area --

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[15] It is recognized that, prior to Metro, the Commission had declined to require a demonstrated "nexus" between the award of a minority preference and the potential contribution to "diversity" of the minority-owned applicant: See Waters Broadcasting Corp., 91 FCC 2d 1260 (1982), aff'd West Michigan Broadcasting Co. v. F.C.C., 735 F.2d 601 (D.C.Cir. 1984).

It is also recognized that the majority of the Metro court specifically held that the nexus could be broadly presumed, and did not require proof on a case-by-case basis. However, the minority (Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy) specifically disagreed on the "nexus" issue (as well as on the issue of the appropriate standard of review, which, in the view of the majority, permitted it to rest on Congressional findings of a generalized nexus, and to overlook the lack of a specific nexus demonstration).

Given that three of the five justices making up the Metro majority have retired and been replaced by Justices Souter, Thomas, and Ginsburg, it is improbable that today's Court would reach the same result as the Metro majority did on this point.

and for good reason: According to the 1990 census, there are just 2 Hispanics in Eldon, and Wapello County (in which Eldon and Ottumwa are located) contained just 224 Hispanics, representing just 0.6% of its 35,687 population.[16]

F. The Judge's Ultimate Conclusion Was Unreasoned, And Failed to Accord Appropriate Weight To The Various Comparative Factors

¶113 of the Initial Decision declares that "Sample is the winner," based on the simplistic and unreasoned conclusion that its credits outweigh Rivertown's. Yet immediately preceding that conclusion, the Judge acknowledged that Rivertown's credits for both local residence and broadcast experience are "substantial" while those of Sample are only "moderate." He appears to have awarded Sample a preference for civic activities, separate and apart from its local residence credit, apparently not recognizing that these factors combine to reflect the applicant's awareness of community needs and interests.

According Sample unique credits for minority ownership and auxiliary power (the errors of which have been addressed above, as well as his erroneous denial of credit for Brown's civic activities), the Judge appears to regard either or

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[16] This was noted at footnote 13 to Rivertown's Reply Findings, and official notice of the census data (attached thereto) was requested. The Judge did not mention, much less rule upon, Rivertown's request.

both as trump cards, inevitably prevailing over Rivertown's substantial preferences for residence and experience.

In short, there is no discernable path by which the ultimate choice was made. While comparative analyses may be difficult, something more than a religious experience is required.

G. The Failure to Enlarge Issues To Inquire Into The Basis For KKSI's Termination of Ms. Sample-Day's Employment in August 1993 Was Error

By its amendment of September 17, 1993, Sample reported that Ms. Sample-Day's employment had been terminated by KKSI on August 18, assigning as the reason therefor that the station was "downsizing" its staff and "eliminating its full time news department." At the same time, Ms. Sample-Day stated that she "is currently seeking part-time, free-lance employment with various broadcast stations." Unexplained by Sample was why, if she was satisfied with part-time employment, she was not retained by KKSI in a part-time position.

Standing alone, these are "facially contradictory facts" similar to those which the Board and the Commission have found to require evidentiary exploration under enlarged issues: See Kate F. Thomas, 8 FCC Rcd ___, Memorandum Opinion and Order (FCC 93R-54), released October 28, 1993, ¶10, and cases cited therein.